Improving housing conditions in the private and social rented sectors: The Homes (Fitness for Human Habitation) Act 2018 - fit for habitation but fit for purpose?

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Abstract: The Homes (Fitness for Human Habitation) Act 2018 became law in December 2018 and enters into force on 20th March 2019. This article examines the key provisions of this significant piece of housing legislation which has the potential to transform the lives of those renting homes both in the private and social sectors in England. The 2018 Act, through amendment to the Landlord and Tenant Act 1985, introduces a new obligation on landlords to ensure their residential properties are fit for human habitation and, for the first time in this jurisdiction, endows tenants with new civil rights to directly enforce this implied covenant against failing landlords. This article identifies the key deficiencies within the current legal framework around fitness for human habitation and explores how far the 2018 Act meets these challenges; set against the febrile backdrop of an acute housing crisis and the Grenfell Tower tragedy.

Keywords: housing, housing policy, renting, fitness for human habitation

INTRODUCTION

The Homes (Fitness for Human Habitation) Act 2018 (hereafter 'H(FHH)A 2018') received Royal Assent on the 20th December 2018 and comes into force 3 months later on the 20th March 2019.[1] The H(FHH)A 2018, which extends to England and Wales but will apply to

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tenancies in England only,[2] is that rarest of legislative animals; a statute which is at the same time both refreshingly brief and yet extraordinarily wide-ranging in effect. The 2018 Act carries with it the very real potential to transform lives by re-dressing a long-standing scourge existing in housing in England, namely the alarming number of residential homes in both the social and private rented sectors which remain classed as non-decent and fall below the standard of fitness for human habitation. As the Preamble to the new statute explains, the 2018 legislation 'amend[s] the Landlord and Tenant Act 1985 to require that residential rented accommodation is provided and maintained in a state of fitness for human habitation.' Those unfamiliar with the current state of housing stock in England may question the need for such a statute to ensure 'fitness for human habitation.' Yet, for those working on-the-ground providing housing advice, in housing charities, law centres and those researching in this area of law, the case for such legislation has long been made out. The 2018 Act arrives at a time of acute housing crisis in England and in the wake of the Grenfell Tower tragedy in London in 2017 which has shone a critical search-light on the state of housing and housing inequality in the 5th biggest economy in the world.[3] This article explores this timely and significant piece of legislation; its scope and likely impact and reflects on how far the

[1] H(FHH)A 2018, s2(2).

[2] H(FHH)A 2018, s2(1). Housing is devolved to the relevant administrations in Scotland, Wales and Northern Ireland. The Welsh Government has already included similar provisions to the H(FHH)A 2018 in relation to housing fitness in the Renting Homes (Wales) Act 2016.

[3] Price Waterhouse Coopers predict the UK could fall to the 7th largest economy post-Brexit: *UK Economic Outlook* (Report November 2018), PWC: available at: https://www.pwc.co.uk/economic-services/ukeo/ukeo-nov18-final.pdf.

deficiencies in the legal framework around fitness for human habitation will or will not be addressed effectively by the provisions of the H(FHH)A and thus whether the 2018 Act will realise its potential to re-shape the housing landscape in England.

BACKGROUND AND IMPETUS FOR THE 2018 ACT

Entering into force on 20th March 2019, the 2018 Act is likely to be overlooked by many commentators as much of the legal and political bandwidth is swallowed up by debates around Brexit and the UK's impending departure from the European Union on 29th March 2019.[4] Nevertheless and putting Brexit aside, this new housing legislation warrants close attention. The 2018 Act began life as the Homes (Fitness for Human Habitation) Bill 2017-19 and was introduced as an opposition Private Members' Bill into Parliament by Karen Buck, Labour MP for Westminster North.[5] In offering the background to the Bill, Buck explained, 'tenants need greater protection, and … whilst having a stronger voice in decisions affecting them is vital, so too are clear, enforceable legal rights.'[6] Importantly, the Bill was said, in part,

[4] The UK leaves the EU at 11pm on 29th March 2019 (so-termed 'exit day': s20(1) European Union (Withdrawal) Act 2018) following the triggering of Article 50 of the Treaty of Lisbon: available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC.

[5] The original text of the 2017-2019 Bill is available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0010/18010.pdf.

[6] MP Karen Buck explaining the impetus for her 2017-2019 Bill writing on PoliticsHome.com, 23rd August 2018: available at:

to be a response to the tragic events of the Grenfell Tower fire of 14th June 2017 in which 72 residents lost their lives in the deadliest structural fire in the UK since the 1988 Piper Alpha disaster and worst residential fire in the country since WWII.[7] The almost unprecedented horror of Grenfell and public outcry which followed the fire brought long-overdue attention to housing issues generally but, in particular, to the plight of social housing tenants, the poor quality of housing and the need for tenants' concerns and voices as to the condition and safety of their housing not just to be heard but also to be heeded. It has become trite to say that the UK is in the grips of a housing crisis. Falling rates of homeownership,[8] decades without an inadequate house-building programme, increasing rents and soaring homelessness[9] have led to what politicians themselves now readily-acknowledge is a

https://www.politicshome.com/news/uk/communities/housing/opinion/house-commons/97733/karen-buck-mp-3-million-people-live-unsafe.

[7] As Secretary of State for Housing, Communities & Local Government MP James Brokenshire explained to Parliament in an Oral Statement one year after the tragedy.

[8] Homeownership rates have fallen to 62 per cent in 2016 down from 68 per cent in 1996: Ministry of Housing, Communities & Local Government, *English Housing Survey Stock Condition 2016-17*.

[9] The number of households accepted as homeless by local authorities in England in 2016/17 was 50 per cent higher than in 2009/10; rough-sleeping has increased by 169 per cent since 2010 and homelessness deaths up by 125 per cent in just five years: S. Fitzpatrick et al, *The Homelessness Monitor: England 2018* (Crisis, April 2018), available at: https://www.crisis.org.uk/media/238700/homelessness_monitor_england_2018.pdf.

'national crisis'[10] and what Prime Minister Theresa May herself described as 'a source of national shame.'[11] A Commission set up by the housing charity, Shelter, in the wake of the Grenfell tragedy, issued its full report in January 2019 in which the poor state of housing in England (and notably of social housing)[12] was highlighted as well as attention drawn to the need for 3.1 million more social homes to be built over the next 20 years to avoid the risk of an entire generation of young people being trapped in insecure and often unsafe conditions of private rented sector accommodation. In terms of new law and policy, the housing crisis has prompted a slew of new housing measures as well as a flood of political rhetoric and, at times, seemingly undeliverable promises.[13] By way of example, the Housing & Planning Act

[10] The Committee of Public Accounts, Report 18th December 2017; available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/462/46202.htm.

[11] Prime Minister, Theresa May, speaking at London Planning Conference, 8th March 2018.

[12] Shelter, *Building for our future: A vision for social housing* (January 2019): available at: https://england.shelter.org.uk/support_us/campaigns/a_vision_for_social_housing.

[13] See generally the Local Government Association, *What the Manifestos Say 2017: Housing & The Environment* (London: May 2017). At the 2017 General Election, the Conservatives repeated a 2015 promise to build 1 million homes by 2020; Labour pledged to build 1 million homes by the end of the next Parliament with at least 100,000 built each year of genuinely affordable (to rent or buy) council and housing association homes; the Liberal Democrats repeated their commitment to building 300,000 homes per year; UKIP said it would build 100,000 homes annually for younger people and the Green Party pledged 100,000 social homes to be built every year.

2016[14] was heralded as the means by which the Government would boost house-building and homeownership as well as extend the totemic Thatcherite 'Right to Buy' policy to social tenants in housing associations. The 2016 Act pledged 200,000 Starter Homes and saw the introduction of a 'Database of Rogue Landlords and Property Agents.'[15] More recently, media attention has fixed evermore prominently on the rise of homelessness and the inescapable, observable reality of greater street homeless in Britain.[16] The Homelessness Reduction Act 2017 was passed as part of the May Conservative Government's pledge to halve rough sleeping by 2020 and eliminate it altogether by the end of 2027.[17] The Homelessness Reduction Act 2017 imposes both new and expanded duties on local authorities to prevent homelessness. 2018 saw the publication of Dame Judith Hackitt's Independent Review of

[14] On which see generally C. Bevan, E. Laurie, 'The Housing and Planning Act 2016: rewarding the aspiration of homeownership? 80(4) MLR 661-684.

[15] The database was provided for in the Housing & Planning Act 2016 and became operative in April 2018 under the provisions of the Housing and Planning Act 2016 (Database of Rogue Landlords and Property Agents) Regulations 2018 SI 2018/258; on the 2016 Act see C. Bevan, E. Laurie, 'The Housing and Planning Act 2016: rewarding the aspiration of homeownership? 80(4) MLR 661-684.

[16] Shelter (Campaign January 2018) estimates a household is currently made homeless every 13 minutes.

[17] A pledge first made in the 2017 Conservative Party Manifesto, *Forward Together: Our Plan for a Stronger Britain and a Prosperous Future* (2017), 58.

Building Regulations & Fire Safety[18] and a Government Green Paper[19] said to offer 'a new deal' on social housing rebalancing the relationship between landlords and tenants.

Outside these diverse initiatives, however, and clearing its Parliamentary journey just in time for Christmas 2018, the H(FHH)A 2018 arguably hits at a more essential and elemental concern. The H(FHH)A 2018 promotes a startlingly simple objective: to ensure that rental properties in England are fit for human habitation and that, should these properties not meet this standard, that those tenants enjoy legal rights so as to be able to force landlords to make improvements in order that their housing is raised to meet the acceptable fitness standard. The 2018 Bill which became the 2018 Act received widespread support cross-party in Parliament including the strong support of the Government,[20] had the backing of housing charities such as Shelter and Crisis[21] who have long campaigned for changes in the law on

[18] J. Hackitt, *Building a safer Future: Independent Review of Building Regulations and Fire Safety Final Report* (CM9607, May 2018): available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707785/Building_a_Safer_Future_-_web.pdf.

[19] Ministry of Housing, Communities & Local Government, *A New Deal for Social Housing* (CM9671, August 2018).

[20] Government support for the Bill was confirmed publicly by then Minister for Housing, Sajid Javid MP, on 14th January 2018 on the grounds that 'public safety is paramount' and the Government would do 'everything possible to protect tenants' *Government Press Release* (14th January, 2018).

[21] See, for example, *Shelter Briefing: Fitness for Habitation Bill* (2018).

property conditions, and followed several reports by Government Select Committees which had recommended the law on fitness for habitation be reviewed and reformed.[22] Importantly, support came not just from tenant-friendly circles. Both the Residential Association of Landlords (RLA) and National Association of Landlords (NLA) expressed backing for the Bill. Policy Director at the RLA captured the mood in the following terms:

'Tenants have a right to expect that homes are fit for habitation, and the vast majority of good landlords already provide this. This Bill therefore reinforces what landlords should already be doing.'[23]

The environment was apt for the 2018 Bill to pass almost unamended into law set as it was against the febrile backdrop of the housing crisis, a growing indignation felt across all sections of the population at the housing situation in Britain and with the ever-present spectre of the Grenfell tragedy focusing minds on the issue of housing inequality in Britain; arguably the issue of our times. This was, however, not the first attempt or first time that Karen Buck had sought to wrestle reforms to 'fitness for human habitation' onto the statute book. A similar Private Members' Bill put forward by Buck in 2015-16 had been 'talked out' and filibustered

[22] See, for example, the Communities & Local Government Select Committee 2013 Report, *The Private Rented Sector*, First Report of Session 2013-14 (HC 50).

[23] David Smith, Policy Director at the RLA, reported in W. Wilson, *House of Commons Library Briefing Paper Number CBP08185 Homes (Fitness for Human Habitation) Bill 2017-19* (14th December 2018), 5.

in Parliament.[24] So too had failed attempts to amend the Housing & Planning Bill 2015-16 (which became the Housing & Planning Act 2016) during its passage through Parliament which were voted down by the Government.[25] The 2018 Bill, perhaps for a multitude of reasons (doubtless some purely political), received a far warmer reception in 2018 and is now law. In order to assess the significance and reach of the new Act, the next section considers how property conditions and standards are measured in England and the current law on the 'fit for human habitation' test before the article turns to explore the scale of the problem of non-decent homes in the rental sector. Next, the key deficiencies within the existing legal framework are located and examined before the article moves to unpick the important changes wrought by the H(FHH)A 2018, their likely impact and whether these changes are themselves fit for purpose in seeking to address the identified weaknesses in the current legal landscape.

HOW HOUSING STANDARDS ARE MEASURED: 'FITNESS FOR HUMAN HABITATION'

The term 'fitness for human habitation' is defined in section 10 of the Landlord and Tenant Act 1985 ('LTA 1985') which provides that a property is to be regarded as 'unfit' if it is 'so far defective in one or more of those matters that it is not reasonably suitable for occupation in

[24] The Homes (Fitness for human habitation) Bill 2015–2016 did not proceed beyond 2nd Reading in the House of Commons.

[25] During the Committee Stage of the *Housing and Planning Bill 2015-16*, Shadow Housing Minister, Teresa Pearce, attempted to amend the Bill to introduce Karen Buck's fitness for human habitation proposals.

that condition.' Those relevant matters are given in section 10 as being: repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences and facilities for preparation and cooking of food and disposal of waste water.[26] In addition, the LTA 1985 lays downs a number of terms that are implied into tenancy agreements irrespective of any contrary or express terms.[27] Key among them for present purposes is section 8 of the LTA 1985 which provides that, in any contract for the letting of a house for human habitation, 'notwithstanding any stipulation to the contrary' there is implied:

'(a) condition that the house if fit for human habitation at the commencement of the tenancy, and (b) an undertaking that the house will be kept by the landlord fit for human habitation during the tenancy.'[28]

Sadly, section 8 LTA and its implied term as to fitness for human habitation is all but obsolete and toothless as, over time, this implied term has ceased to have any meaningful effect as it applies only to homes where the annual rent is £52 or lower (£80 or lower in London).[29] It goes without saying that in almost every conceivable, contemporary landlord-tenant relationship, this section 8 implied term of fitness for human habitation is therefore no longer

[26] LTA 1985, s10.

[27] Including a landlord's implied covenant to repair under LTA 1985, s11 which is discussed in further detail below.

[28] LTA 1985, s8(1)

[29] LTA 1985, s8(2)

operative as the rent limit will have been far exceeded thus disapplying the implied term.[30] Save for two rather narrow and context-specific common law obligations on landlords to ensure fitness for human habitation in furnished and newly-constructed rental properties,[31] as the House of Commons Library records, prior to the enactment of the 2018 Act 'there [was] therefore no general obligation implied in a tenancy agreement for a landlord to maintain their property at a level fit for human habitation which would allow tenants a civil remedy if a property is deemed to be unfit.'[32]

[30] According to the latest *HomeLet Rental Index* (December 2018), the average monthly rent in London in December 2018 was £1596; and £921 across the country as a whole far exceeding the annual rent limits provided under LTA 1985, s8.

[31] These two obligations operate such that (1) there is a condition implied into tenancy agreements as to furnished premises that the premises are let in a state reasonably fit for human habitation (note: there is no on-going duty to keep the premises in such a state and there is no implied condition as to unfurnished premises); (2) as regards houses let in the course of erection, there is an implied undertaking that, at completion, the house should be fit for human habitation (note: this does not apply to tenancies entered into after the house is finished): see RLA, Landlord Guides, *Repairs* [last accessed January 2018].

[32] W. Wilson, *House of Commons Library Briefing Paper Number CBP08185 Homes (Fitness for Human Habitation) Bill 2017-19* (14th December 2018).

That is not to say that there is no oversight or regulation whatever as to the state of housing in England. Under the Housing Act 2004,[33] local authorities are fixed with a regulatory responsibility for ensuring that housing in their areas is kept under review, to identify concerns and to pursue any necessary enforcement action.[34] Local authorities have the power to force landlords to address serious 'hazards' in residential premises.[35] The Housing Act 2004 introduced the Housing, Health & Safety Rating System ('HHSRS')[36] which, in force since 2006, requires local authorities, where appropriate, to inspect residential premises and to identify hazards.[37] The HHSRS is tenure neutral and therefore applies to both social and private rental properties. Local authority inspections are most commonly triggered by a complaint raised by a resident. Where an authority identifies the most serious hazards (known as 'Category 1'

[33] On which see generally, D. Ormandy, H. Carr and C. Hunter, ' Assessing housing conditions: the HHSRS past, present and future' 17(4) *Journal of Housing Law* 84-89.

[34] Housing Act 2004, s3.

[35] Housing Act 2004, s2 defines 'hazards' as, 'any risk of harm to the health or safety of an actual or potential occupier of a dwelling … which arises from a deficiency in the dwelling…'

[36] On which see generally A. Adcock, W. Wilson, *House of Commons Library Briefing Paper Number 01917 Housing Health and Safety Rating System (HHSRS)* (24 May 2016); the Government has confirmed that it will review the HHSRS in 2019: HC Deb 26 October 2018 col 553; D. Ormandy, H. Carr and C. Hunter, ' Assessing housing conditions: the HHSRS past, present and future' 17(4) *Journal of Housing Law* 84-89.

[37] As to the nature of inspections, see Housing Act 2004, s4.

hazards),[38] the authority is placed under a duty to take action[39] but it is also given discretion as to whether to take action[40] as regards less serious hazards ('Category 2' hazards).[41] In this way, the HHSRS is 'not a pass or fail test of housing fitness'[42] but rather a risk assessment system. Importantly, a local authority cannot take enforcement action against itself (i.e. where the local authority is the freeholder of the land in question).[43]

Beyond the HHSRS, is the 'Decent Homes Standard' which whilst being a non-statutory measure of housing standards is widely-acknowledged, referenced in statistical data and relied upon as a key indicator of the state of housing stock in England. Introduced by the Blair Labour Government, the Decent Homes Standard defines a 'decent' home as one that meets the following criteria: is free from Category 1 hazards as assessed by the HHSRS; is in reasonable repair; has reasonably modern facilities and services and provides a degree of thermal comfort.[44] Research into the Decent Homes Standard by, for example, the Housing, Planning, Local Government and the Regions Select Committee, has, however, concluded that the standard is set 'at too basic a level' and that what is considered 'decent' by reference to

[38] Defined in HA 2004, s2(1).

[39] HA 2004, s5.

[40] HA 2004, s7.

[41] Defined in HA 2004, s2(1).

[42] W. Wilson, n 23 above, 8.

[43] This was established in the case of *R* v *Cardiff CC ex p Cross* (1983) 6 HLR.

[44] Department of Communities & Local Government, *A Decent Home: the definition and guidance for implementation* (London: June 2006).

the decent home standard is likely to be significantly out of step with 'reasonable tenant expectations.'[45] Despite its shortcomings, the Decent Homes Standard remains in wide use, however, for example in the English Housing Survey which is produced annually and provides an authoritative gauge of the condition of housing in England.[46] Having located how fitness for habitation is currently measured,[47] the next section considers the scale of the problem of non-decent and unfit homes in England and thereby sets the scene for the discussion of the new provisions of the 2018 Act which follow.

THE PROBLEM AND SCALE OF UNFIT HOUSING IN THE PRIVATE AND SOCIAL RENTED SECTORS IN ENGLAND

[45] Office of the Deputy Prime Minister, Housing, Planning, Local Government and the Regions Select Committee, *Decent Homes*, Fifth Report of Session 2003-04, (HC 46-I, CM 6266).

[46] The English Housing Survey is a continuous national survey commissioned by the Ministry of Housing, Communities and Local Government into citizens' housing circumstances and conditions in England. The first survey was conducted in 1967; see generally: https://www.gov.uk/government/collections/english-housing-survey.

[47] Landlords are subject additionally to a wide range of maintenance and repair duties in relation to rental properties as to carbon monoxide detectors, thermal efficiency, gas and electrical safety, for example, under the Gas Safety (Installation and Use Regulations 1998) and under) of the Housing & Planning Act 2016, s122 (not in force as of February 2019) are required to make regular, mandatory electrical safety checks.

Concerns have, for some considerable time, been raised from diverse quarters as to rental housing conditions and standards in England, in particular, in the private rented sector ('PRS').[48] The PRS has doubled in size in the last 20 years and now accommodates more households in England than the social sector yet has some of the poorest housing standards across all housing stock. In 2016-17, 20 per cent of all households in England were renting privately compared to 17 per cent of households in the social rented sector.[49] According to Government statistics, in 2016, 27 per cent of privately rented homes and 13 per cent of social homes failed the Decent Homes Standard in England.[50] This amounted to 4.7 million homes or 1/5th of all housing in England failing to satisfy the basic, Decent Homes Standard.[51] Whilst this represented a decline in the proportion of non-decent homes from a staggering peak of 35 per cent of homes in 2006, the number of non-decent homes has remained stubbornly constant since 2014 in part as a result of the increase in size of the PRS.[52] In addition, data revealed that, in 2016-17, 38 per cent of private renters and 22 per cent of social renters lived

[48] See, amongst others, House of Commons, Communities & Local Government Select Committee 2013 Report, *The Private Rented Sector*, First Report of Session 2013-14 (HC 50); Shelter, *Safe and Decent Homes: Solutions for a better Private Rented Sector* (2014).

[49] Ministry of Housing, Communities & Local Government, *English Housing Survey Headline Report 2016-17*.

[50] Ministry of Housing, Communities & Local Government, *English Housing Survey: Stock Condition 2016*, 4.

[51] *ibid*.

[52] *ibid*.

in ‘poor housing’ which embraces a wider definition than ‘non-decent’.[53] Shelter’s 2019 report into the state of housing in Britain revealed, in sharper focus still, more troubling data around the poor standards of housing in particular in the private sector. Shelter highlighted that more than 1 in 7 of England’s private rented homes contained a ‘Category 1’ hazard; meaning a hazard posing an immediate threat to health or safety;[54] that over 50 per cent of private renters had experienced at least one problem with the condition of their home (from mould, damp, to electrical issues or pest infestations) within the previous 12 months[55] and that, according to the Resolution Foundation, 45 per cent of 65-74 year olds living in the PRS lived in non-decent and unfit conditions.[56]

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[53] Defined as a home that has serious damp or mould, a Category 1 HHSRS hazard, is non-decent, or has substantial disrepair. A Category 1 HHSRS hazard is a hazard that poses a serious threat to the health or safety of people living in or visiting a home, including exposed wiring or overloaded electrical sockets.

[54] Shelter, *Building for our future: A vision for social housing* (January 2019), 51 drawing on Ministry of Housing, Communities & Local Government, *English Housing Survey: Private Rented Sector Report*: 2014/15; available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570848/Private_Rented_Sector_ Full_Report.pdf.

[55] YouGov, *Survey of 3,978 private renters in England*, (July-August 2017).

[56] A. Corlett, L. Judge, *Home Affront, Resolution Foundation* (2017): available at: https://www.resolutionfoundation.org/publications/home-affront-housing-across-the-generations/.

The situation is therefore stark: a significant proportion of those renting residential properties in England whether that be in the private or social sector (the private rental sector being the fastest growing housing tenure in Britain)[57] are living in homes that fall below a basic standard of decency and fitness for human habitation. Self-evidently, this flows from failings within the current legal framework to guarantee housing standards and it is those deficiencies that the next section locates and unpacks.

DEFICIENCIES OF THE CURRENT LEGAL FRAMEWORK

The current legal framework as outlined in the previous section has evidently failed to eradicate or markedly reduce non-decent and unfit housing in England. Despite declining numbers of non-decent homes in the lead up to 2014, the figures have since stagnated and remain unacceptably high. This section identifies and reflects on a series of deficiencies within the legal framework around fitness for habitation exposing the law in this area as a flawed, piecemeal and outmoded system. The result is a legal framework that has failed to provide a robust mechanism for ensuring decent housing conditions in millions of rental premises and fails to deliver on a basic and not unreasonable expectation that properties let as homes will be fit for human habitation. A series of problems with the present framework will be explored here which, taken together, make the case for reform and must, it is argued, be seen as the

[57] *English Housing Survey: Stock Condition 2016* (n 50 above) reported at 4 that, in 2016, 15% (750,000) of private rented dwellings had at least one Category 1 hazard compared to 13% in the owner occupied and 6% in the social rented sector.

environment in which the new provisions of the H(FHH)A 2018 are enacted and should be assessed. Five central deficiencies in the current legal framework are identified.

A first key deficiency concerns the section 8 LTA 1985 implied term as to fitness for human habitation which, as explored above, is essentially defunct due to antiquated and unamended rent limits. The effect of this, as the Law Commission explored over two decades ago,[58] is that section 8 has been allowed to 'wither on the vine.'[59] The Law Commission in its 1996 report on reform of the LTA 1985 recommended removal of the rent limits in section 8 as its preferred means of ameliorating the law in this area.[60] The Law Commission's recommendations were not adopted and, in short, today there exists, in practice, no statutory duty on landlords to ensure that rental properties are let or maintained in a condition that is fit for human habitation. This raises a very real problem for existing tenants who find themselves in premises which are non-fit whether that be in the private or social rental sector. Such tenants will find themselves with little or no civil remedy. So long as the law around section 8 LTA 1985 remain unchanged, tenants residing in non-fit housing do not therefore

[58] Law Commission Report No. 238 *Landlord and Tenant: Responsibility for State and Condition of the Property* (19th March 1996).

[59] *ibid* at [8.11].

[60] The new civil remedy recommended by the Law Commission through reform of s8 LTA 1985 would be subject to a number of exceptions. The civil remedy would not, for example, be available in longer leases (tenancies over 7 years' duration); where the tenant was responsible for damage to the let property, for maintaining any tenant's fixtures and would not apply to farm business and agricultural tenancies: see n59 at [8.36-8.43].

have adequate remedies at their disposal. In not keeping apace with rent levels, section 8 LTA 1985 has been allowed to become entirely redundant as recognised by the Court of Appeal over a decade ago in *Issa v Hackney London Borough Council* where Brooke L.J. noted that tenants in non-fit premises, 'remain wholly without remedy in the civil courts against their landlords, however grievously their health may have suffered because they are living in damp, unfit conditions.'[61]

A second deficiency in the current legal framework concerns the limitations of section 11 of the LTA 1985. Section 11 is the principal statutory repairing obligation imposed on landlords which operates by implying certain repairing covenants into tenancy agreements and is sometimes referred to as a landlord's 'repairing obligation.'.[62] Section 11 of the LTA 1985 implies into tenancy agreements of less than 7 years[63] an absolute and non-excludable

[61] *Issa* v *Hackney London Borough Council* (1997) 1 WLR 956, 694 per Brooke L.J.

[62] The origins of the current statutory repairing obligation on landlords can be traced back to the Housing Act 1961, s32 though obligations on landlords differently-constituted have existed as far back as the Housing of the Working Classes Act 1885 and Housing Acts of 1925 and 1936.

[63] Some tenancies are statutorily excluded from the implied covenant of repair under LTA 1985, s11 including tenancies created before 24th October 1961, tenancies of 7 years or more duration, certain business, agricultural and Crown tenancies: see LTA 1985, ss13(1), (2), 32(2), 14(4). By way of a new LTA 1985, s13(1A) inserted by Localism Act 2011, s166 the LTA 1985, s11 implied covenant of repair now covers tenancies of 7 years or more if they were granted after 1st April 2012 and are either (i) flexible or secure tenancies; or (ii) assured or assured

obligation on landlords to keep in repair the rented premises and carry out basic repair works. Landlords are under an obligation to ensure that the structure and exterior of the rented premises (including drains, gutters, pipes)[64] are in good repair and that installations for the supply of water, gas, electricity, sanitation[65] and for heating water are in 'proper working order.'[66] A landlord cannot escape its obligations through expressly-drafted terms in the tenancy agreement[67] nor force responsibility for carrying out these repairs onto the tenant.[68] Often the argument is made that tenants in unfit accommodation can simply rely on section 11 to redress the poor state of their housing. However, this overstates the scope of the landlord's implied repairing obligation as section 11 is, in fact, far more circumscribed, in practice, than first appears. By way of example, section 11 neither requires a landlord to provide installations where none currently exist nor to upgrade existing installations which might be regarded as inadequate or inefficient against modern standards. Moreover, section 11 does not require a landlord to do any repairs works for which the tenant is responsible under the tenant's duty to use the premises in a tenant-like manner.[69]

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shorthold tenancies granted by a private registered provider of social housing other than relating to shared ownership properties.

[64] LTA 1985, s11(1)(a).

[65] LTA 1985, s11(1)(b).

[66] LTA 1985, s11(1)(c).

[67] LTA 1985, s12(1)(a).

[68] LTA 1985, s11(4).

[69] On which see discussion, amongst others, in *Warren* v *Keen* [1954] 1 QB 15 per Denning L.J.

Crucially, a landlord's repairing obligation is only engaged if the repair works sought by a tenant are actually covered by section 11. The central and most contested issue is therefore whether an item of required work falls within the purview of the statute at all. Much legal argumentation has been heard and much judicial ink spilled in delimiting the parameters of the provision, for example, on determining what amounts to the 'structure' and 'exterior' of a dwelling. Case law has established that 'structure' includes a dwelling's walls[70] (and wall plaster[71]), floors and windows. A dwelling's 'exterior' connotes the outside of the property[72] and extends to those parts which are often referred to as the 'skin' of the premises such as external walls, windows and doors. The limits of section 11 are, however, far from settled as disputes continue to reach the highest courts. The question of whether paths and steps used as means of accessing a dwelling constituted the 'exterior' of a property was recently re-visited by the Supreme Court.[73] Overruling earlier authority,[74] the Supreme Court in *Edwards* v *Kumarasamy* held that the fact that a piece of land is a necessary means of access to a

[70] Walls includes partition walls: see, for example, *Green* v *Eales* (1841) 114 ER 88.

[71] See *Grand* v *Gill* [2011] EWCA Civ 554; [2001] 1 WLR 2253.

[72] As clarified in *Campden Hill Towers Ltd* v *Gardner* [1977] QB 823.

[73] *Edwards* v *Kumarasamy* [2016] UKSC 40; on which see, amongst others J. Sandham, 'The Curious Incident of Mr Edwards and the Paving Stone that No One Notice' 19(5) *Journal of Housing Law* 97-101 and N. Roberts, 'When Leaseholders are Landlord' 80(5) *Conveyancer and Property Lawyer* 470-480.

[74] It has been held in *Brown* v *Liverpool Corp* [1969] 3 All ER 1345 that access paths and steps were part of a dwelling's exterior for the purposes of LTA 1985, s11.

dwelling is not, of itself, sufficient for that piece of land to constitute part of the 'exterior' of that dwelling. A path leading to a door opening onto the front hall of a dwelling was not, therefore, part of the exterior of that front hall. The Supreme Court stressed that to avoid a nonsensical result or one inconsistent with Parliament's intention in legislating, section 11 should be given its ordinary meaning. As the provision imposed obligations over and above those contractually agreed by the parties, the court should not be too ready to adopt a wide and unnatural reading of the section.[75] The applicability of section 11 centres on a key distinction routinely drawn in the case law (arguably artificially and arbitrarily) between repairs, renewals, and improvements. According to this distinction, a landlord is obliged to conduct repairs but not obliged to undertake improvements or works of renewal which fall outside the provision. Navigating and clarifying this often-narrow dividing line is a long-standing and on-going process of continuous interpretation by the court. In *McDougall v Easington DC,*[76] the Court of Appeal laid down three tests which, it said, were relevant to whether works constitute a repair, an improvement or a renewal in the context of section 11:

(i) Whether the alterations went to the whole or substantially the whole of the structure or only to a subsidiary part;

(ii) Whether the effect of the alterations was to produce a building of a wholly different character than that which had been let;

[75] Whether or not something is part of the 'structure' or 'exterior' of a dwelling and thus covered by section 11 is very much, however, a question of fact and degree to be determined by the court on a case-by-case basis as confirmed in *Irvine* v *Moran* (1994) 24 1 HLR 1.

[76] *McDougall* v *Easington DC* (1989) 21 HLR 310 per Mustill LJ.

(iii) What was the cost of the works in relation to the previous value of the building, and what was their effect on the value and lifespan of the building?[77]

These three tests are to be applied separately or concurrently subject to the facts of the individual case and the nature and age of the property in question, the condition of the premises when the tenant moved in, and by reference to any express terms of the tenancy. As held on the facts of *McDougall*, where the alterations to the premises represent a substantial change to the life and value of the property, this will suggest a 'renewal' of the property rather than merely a repair and thus those works will fall outside the provisions of section 11.

It is fair to say that the repair-improvement-renewal distinction has given rise to significant case law much of it seemingly inconsistent and difficult to justify. Thus, case law establishes that while a landlord can be compelled to fix a broken boiler (as part of its obligation to keep installations in good working order), a landlord cannot be compelled to address a property overrun with condensation damp and mould springing from a design defect (which it is said to not result from any disrepair as to the structure or exterior of the building).[78] In contrast, rising damp has been held to fall within a landlord's repairing obligations.[79]

[77] *McDougall* at 316 per Mustill L.J.

[78] *Quick* v *Taff Ely BC* [1986] QB 809.

[79] *Uddin and another* v *Islington LBC* [2015] EWCA Civ 369.

Even in the event that a tenant can bring its poor housing conditions within the scope of section 11, there are two further complexities and limitations to consider vis-à-vis the operation of the provision: first, the requirement for tenants to serve notice of the disrepair on the landlord and, secondly, issues around the 'common parts' of the rented properties. As the Supreme Court in *Edwards* has recently confirmed, a landlord's repairing obligation operates as a warranty that the let premises will be in good repair. An important exception to this is that a landlord's liability to repair premises in the possession of the tenant is not triggered unless the landlord has notice of the disrepair; after which the landlord has a reasonable time to complete the work.[80] The rationale for this 'notice requirement' (which interestingly has been developed by the common law and does not appear in statute) is two-fold: first, it being unreasonable to expect a landlord to remedy a situation about which it did not know and, secondly, the tenant's advantageous position; it being in possession of the premises.[81] The notice requirement can prove particularly problematic as regards repairs to 'common parts' of property. Common parts are those parts which a tenant shares with other tenants or resident landlords such as stairways, hallways and lifts. Increasingly, with the

[80] On which see *Makin* v *Watkinson* [1870] LR 6 Ex 25; *O'Brien* v *Robinson* [1973] AC 912; *Calabar Properties* v *Sticher* [1983] 3 All ER 759; *Morris* v *Liverpool* (1987) 20 HLR 498; *Earle* v *Charalambous* [2006] EWCA Civ 1090.

[81] See Lord Neuberger's discussion in *Edwards* at [32]-[39] of *Morgan* v *Liverpool Corpn* [1927] 2 KB 131 and *Carrick* v *Liverpool Corpn* [1947] AC 219 as to the requirement for notice to be served; see also *O'Brien* v *Robinson* [1973] AC 912 where the House of Lords confirmed that there was a notice requirement as regards repair covenants implied by the Housing Act 1961, s32(1)(a).

expansion in buy-to-let and houses in multiple occupancy (HMOs), a situation arises where, for example, in a block of flats, the common parts of the building are neither in the possession of the tenant nor in the possession of the landlord who may not be the freehold owner of the block of flats (but owner of just a single flat). In this complex and technical scenario, the Supreme Court in *Edwards* suggests that, despite the common parts being in possession of neither the tenant nor the tenant's landlord, it would still be necessary for the tenant to serve notice of any disrepair of the common parts on its landlord before liability under section 11 would be triggered.[82]

What is clear is that section 11 is constrained in its scope and the provision does not extend to wider issues of non-fitness for human habitation such as those of fire safety, poor heating systems, ventilation failings, mould or condensation falling outside the accepted interpretation of 'repairs.' Tenants must squeeze disrepairs within the terms of section 11 and, even if section 11 is found to be in play, many tenants who may be vulnerable or unaware of their legal rights may not be willing or able to raise a complaint, serve notice on their landlord or may lack the fortitude to see a complaint through to its necessary resolution. Many tenants are therefore in a veritable catch-22 forced to shut up and put up with defective housing rather than risk losing their home. This is especially problematic at a time when the country faces an acute housing shortage where finding alternative and affordable housing in a tenant's local area may simply not be feasible.

[82] *Edwards* at [49] per Lord Neuberger as the court explained, it is always open to landlords in this situation to include a notice requirement by way of an express term of the tenancy agreement to avoid any potential confusion.

A third and related problem of the current legal framework concerns so-called retaliatory or revenge evictions in the private rental sector.[83] Such evictions arise in circumstances where, in response to a tenant's request for repair of a defective property, rather than seek to address the issue, a landlord instead serves a section 21 Housing Act 1988 notice ('section 21 notice') which allows for termination of an assured shorthold tenancy and eviction of a tenant without the need to establish that the tenant has done anything in breach of the tenancy or otherwise is at fault in any way. Under a section 21 notice, a landlord need give no grounds for the eviction and will enjoy an automatic right to regain possession of the property once a fixed period of time has expired. This gives rise to what Citizens Advice Bureau has termed 'the tenant's dilemma' whereby tenants risk losing even their non-decent, defective home if they dare complain.[84] Quite simply, the fear of a no-fault eviction deters tenants from raising legitimate complaints about life-threatening and poor quality housing and the section 21 notice procedure therefore seriously undermines tenants' rights to secure repairs to their homes. New measures have been introduced in an attempt to deter landlords from

[83] There is no statutory definition but it is explored generally in W. Wilson, *House of* Commons Library Briefing Paper Number 7015 *Retaliatory Eviction in the Private Rented Sector* (13th June 2017); also see Shelter, *Press Release, True Scale of Revenge Evictions Exposed by Shelter Investigation* (17th October 2018) and Inside Housing, *More than 200,000 PRS Tenants Unfairly Evicted*, Inside Housing (12th March 2014).

[84] Citizens Advice Bureau, *The Tenant's Dilemm*a (June 2007).

retaliatory evictions. Under section 33 of the Deregulation Act 2015,[85] for example, a landlord is prevented from serving a section 21 notice within 6 months of a local authority issuing it with an improvement notice in relation to a hazard of Category 1 or 2. Whilst this offers a degree of protection to tenants against retaliatory eviction, it does not cover a tenant's right to repair under section 11 of the LTA 1985 and thus the tenant's dilemma endures. A 2017 survey of private renters conducted by YouGov on behalf of Citizens Advice Bureau found that of those tenants questioned: 57 per cent said they would not pursue matters of repair and compensation for defects against a landlord for fear of eviction; 51 per cent expressed concern that, should they complain, the landlord would increase their rent; 30 per cent admitted to carrying out repairs themselves; with 14 per cent paying for those repairs out of their own pockets.[86]

A fourth and crucial failing within the current legal framework concerns the HHSRS itself which, as explored earlier in this article, sits as a central pillar to the current regulatory regime on fitness for human habitation in that it places duties on local authorities to take

[85] On which see, for example, J. Luba Q.C. and J. Compton, 'An end to retaliatory evictions? New measures on repossession by private landlords' 19(3) *Landlord & Tenant Review* 113-118; Citizens Advice*, Briefing for Report Stage of the Deregulation Bill* (11th February 2015);

[86] Citizens Advice Press Release, *'1.85 million households wait longer than they should for a repair in their home to be carried out,'* (13th July 2017) available at: https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/185-million-households-wait-longer-than-they-should-for-a-repair-in-their-home-to-be-carried-out/.

responsibility for overseeing the quality and standard of private and socially-rented property within their authority areas. However, when exposed to scrutiny, the risk-based HHSRS is revealed as wanting in several key respects all of which contribute to the continuing scourge of unfit and sub-optimal housing in England. The HHSRS can be criticised on many fronts. First, there is growing evidence that the HHSRS is both interpreted and applied inconsistently as between different local authority areas. In fact, in evidence placed before the Communities and Local Government Select Committee,[87] it was found that landlords, agents and tenants all raised the same 'universal complaint' that advice and assistance from local authorities as regards the HHSRS was neither forthcoming nor consistent,[88] delays before inspections were made were unacceptably long[89] and, perhaps most troubling of all, many landlords had not even heard of the HHSRS.[90] Secondly, enforcement action undertaken by local authorities under the HHSRS is also often inconsistent, patchy and highly variable across the country. In particular, where a Category 2 hazard is identified, a local authority has discretion as to whether to mount any enforcement action at all. As Karen Buck MP explained in Parliamentary debates around her ultimately ill-fated 2015-16 Private Members' Bill:

[87] HomeLet Direct, *Memorandum to the Communities and Local Government Select Committee* (January 2013).

[88] *ibid* at [48].

[89] *ibid* at [37].

[90] *ibid* at [31].

'The remedy available [in cases of identified Category 2 hazards] depends entirely on the choice that local authorities make, on their enforcement strategy and, of course, on the resources available to them.'[91]

A third important criticism of the HHSRS concerns the bar on local authorities mounting enforcement action against their own housing (i.e. vis-à-vis housing of which it is the freehold owner). This is a clear limitation on the effectiveness of the HHSRS. Thus, while Environmental Health Officers can be asked to investigate the state of private rented homes in a local authority area, this will not happen as to authority-owned premises as no enforcement action can follow. Fourthly, the 'Operating Guidance' documents which inform local authorities how to implement the HHSRS were last updated some 13 years ago in 2006[92] at a time when the private rented sector in particular was notably much smaller in size. Despite repeated calls from various sectors for a review and updating of the 2006 guidance,[93] the Coalition Government in 2015 decided against making amendments to the HHSRS and its guidance in response to an earlier consultation.[94] In 2018, at Third Reading of the Homes (Fitness for Human Habitation) Bill 2017-19 which became the H(FHH)A 2018, the Government at last

[91] HC Deb 16 October 2015, cols 617-8.

[92] Office of the Deputy Prime Minister, *HHSRS Operating Guidance* (London: 2006).

[93] See, for example, House of Commons, Communities and Local Government Committee Report, *The Private Rented Sector* (HC50, July 2013) at [14].

[94] Department of Communities and Local Government, *Review of Property Conditions in the Private Rented Sector: Government Response* (London: March 2015).

confirmed its intention to review the HHSRS in 2019.[95] We await that review but with swingeing cuts to local authority budgets,[96] there is growing evidence that authorities are not making use of the regulatory tools at their disposal and that, once hazards are identified, inspections are slow, conducted only after lengthy delays and, as such, the available legislative and regulatory mechanisms at their disposal to improve the quality of homes in their areas are not being employed to the fullest. The HHSRS which is, therefore, theoretically a highly valuable instrument for the amelioration of housing standards and could prevent dangerous conditions in England's housing stock is neither up-to-date nor being adequately exploited by cash-strapped local authorities.[97]

A fifth and final deficiency in the current legal framework relates to the (un)availability of legal aid to support tenants in non-decent housing to bring legal action against their landlords. This is an oft-overlooked but vital piece in the jigsaw of housing provision in England. Legal aid is now only available to tenants to bring claims in relation to disrepairs where there is evidence of serious risk of harm to health. The decline in legal aid availability means that many tenants are left without any remedy at all. Even where legal aid is available for disrepair claims, it exists only so far as obtaining a court order. Once a court has made an order for repair works,

[95] HC Deb 26 October 2018 col 553.

[96] The Local Government Association estimates that between 2015 and 2020, the Revenue Support Grant to Local Authorities will have shrunk by 77 per cent as reported by A. Bounds, *Financial Times* (4th July 2017).

[97] See Universities of Kent and Bristol, Joint Report, *Closing the Gaps: Health and Safety at Home* (2017), 15.

legal aid falls away. Any subsequent legal action will not be covered by legal aid and would need to be self-funded or be the subject of a conditional fee agreement.[98] As a consequence of this largescale removal of legal aid funding for disrepair cases, many areas of the country have become 'housing law advice deserts' where there are no solicitors with housing contracts for legal aid. In the legal advice vacuum that this creates, tenants are, in many cases, forced to accept, at best, telephone legal advice in what is a thorny and deeply complex area of the law. Tenants' rights are undermined and tenant voices lost[99] when such access to justice concerns flowing from this untenable position are ignored.

This section has identified five key failings within the current legal framework around fitness for human habitation which, taken together, it is argued, amply expose the law and regulation in this area as fragmented, incoherent, outdated and, in part (as to section 8 LTA 1985) redundant. The effect is that the current legal framework provides tenants with what we might term 'emblematic' or 'notional' rights only. In other words, tenants are provided with symbolic rights[100] to seek redress which, in practice, prove to be, for most tenants, entirely hollow and unrealisable. When combined with the unavailability of legal aid in all but the most serious cases and the inability and, at times, reluctance of local authorities to follow-through on the potential of the HHSRS, the case for reform is strong. It is against this backdrop

[98] There is a possibility of receiving legal aid for a claim for damages as a set off by way of defence to a possession claim based on rent arrears.

[99] On which see: M. Cave, *The Cave Review of Social Housing Regulation: Every Tenant Matters A Review of Social Housing Regulation* (June 2007).

[100] See Universities of Kent and Bristol, Joint Report, n 101 above, 10-11.

that the next section considers the specific changes introduced by the H(FHH)A 2018 before turning to reflect on how far the new legislation meets the challenges posed by the deficiencies of the law just outlined.

THE CHANGES INTRODUCED BY THE H(FHH)A 2018

What changes, then, does the H(FHH)A 2018 introduce to alter the legal landscape around fitness for human habitation and, moreover, how far does the new law address the 5 key deficiencies in the current legal framework outlined in the previous section? The first thing to note is that the 2018 Act differs from the Homes (Fitness for Human Habitation) Bill 2015-16 which Karen Buck MP introduced unsuccessfully into Parliament in 2015 in two key respect. Thus, while both the 2015-16 and the 2017-19 Bills share the same central objective of ensuring that properties let as homes are 'fit for human habitation', the 2017-19 Bill represented both an updated and expanded version of its 2015-16 predecessor. The principal changes wrought by the 2018 Act will be examined here. The H(FHH)A 2018 amends the Landlord and Tenant Act 1985 sections 8[101] to 10[102] and, additionally, inserts new sections 9A, 9B and 9C into the LTA 1985.[103]

[101] By way of H(FHH)A 2018, s1(2), LTA 1985, s8 now applies to Wales only.

[102] By way of H(FHH)A 2018, s1(4).

[103] By way of H(FHH)A 2018, s1(3).

As to the essential substance of the Act, then, what does it change? By way of a new section 9A(1) inserted into the LTA 1985, the 2018 Act implies into any applicable tenancy a covenant by the landlord that the dwelling:

'(a) is fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease, and
(b) will remain fit for human habitation during the term of the lease.'

Under a newly-inserted section 9A(4) of the LTA 1985, the implied covenant in section 9A(1) cannot be contracted out or excluded by the landlord either at the time the tenancy is granted or subsequently. Any attempt to exclude or limit the landlord's obligations under the implied covenant or impose on the tenant any penalty to cover any potential cost of the landlord's obligation will be void.[104]

The new implied covenant as to fitness for human habitation extends to the dwelling which is subject to the tenancy and, if that dwelling itself forms part of a larger building (such as a flat in a block or a room in an HMO), the covenant extends to all parts of the building in which the landlord has an estate or interest.[105] In so far as the covenant extends to all parts of the building 'in which the landlord had an interest,' this is important and marks a departure and extension from the 2015-16 Homes (Fitness for Human Habitation) Bill. The effect is that the new implied covenant covers communal or common areas (including staircases and

[104] LTA 1985, s9A(4)(a), (b) inserted by H(FHH)A 2018, s1(3).

[105] LTA 1984, s9A(6) inserted by H(FHH)A 2018, s1(3).

stairwells) and means, in practical terms, that those areas over which for example the Grenfell Tower residents had raised concerns (fire alarms, gas pipes, lack of sprinklers) would today have been covered by this new implied covenant.[106]

Whilst under the new provisions the landlord is responsible to ensure residential premises are fitness for human habitation, there are limits to the work the landlord is expected to carry out to deliver this. By way of newly-inserted sections 9A(2) and (3) LTA 1985, there are a number of exceptions to the operation of the landlord's implied covenant as to fitness:

- The landlord is not required to carry out works related to unfitness caused by the tenant's own failure to behave in a tenant-like manner[107] or that result from the tenant's breach of an express covenant;[108]
- The landlord is not required to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident;[109]
- The landlord is not required to keep in repair or maintain anything the tenant is entitled to remove from the dwelling;[110]

[106] This also mirrors the extent of the LTA 1985, s11 implied covenant of repair.

[107] LTA 1985, new s9A(2)(a).

[108] LTA 1985, new ss9A(2)(a), 9A(3)(a).

[109] LTA 1985, new s9A(2)(b).

[110] LTA 1985, new s9A(2)(c).

- The landlord is not required to carry out works or repairs which, if carried out, would put the landlord in breach of any obligation imposed by any enactment (whenever passed or made);[111]
- Finally, the landlord is not required to carry out works or repairs where that work would require the consent of a third party,[112] the landlord has made reasonable endeavours to obtain that consent but consent has not been given.[113]

How is 'fitness for human habitation' determined under the new Act? Perhaps the most significant aspect of the 2018 Act is its modernisation of the categories that are used to determine whether a home is 'fit for human habitation.' Section 1(4) of the 2018 Act amends and extends the matters listed in the old section 10 LTA 1985 under a new section 10(2) LTA 1985 to include 'any prescribed hazard' as prescribed in regulations made the Secretary of State under section 2 of the Housing Act 2004. What this means in practice is that the 2018 Act imports into the new section 10 LTA 1985 the list of 29 hazards from the current HHSRS (both 'Category 1' and 'Category 2' hazards) and will include any changes made to the HHSRS

[111] LTA 1985, new s9A(2)(d) by way of example, this would include matters such as breaching planning permission, conservation area requirements or listed building consents.

[112] By way of example, the consent of a superior landlord or freeholder, a neighbouring leaseholder or owner, or a local council.

[113] LTA 1985, new s9A(2)(e): this provision was inserted as the Bill made its way through Parliament and did not appear in the Bill as originally drafted.

following the review of the system in 2019.[114] By importing the full list of 29 hazards, the 2018 Act shrewdly obviates the creation of two parallel but distinct systems of housing standards and avoids the introduction of new regulations on landlords as the 2018 Act merely codifies in statute standards that landlords should already be meeting under the HHSRS.

By way of a new section 10(3) LTA 1985, the definition of 'hazard' in section 2(1) of the Housing Act 2004 is revised for the purposes of section 10 'as though the reference to a potential occupier were omitted.' The effect of these changes taken together, is that in determining whether a rental property is unfit for human habitation under the new provisions, regard must be had to the old section 10 LTA 1985 list of factors but also now to the 29 hazards of the HHSRS and whether there is a risk of harm to the health or safety of the occupiers. The key issue and question for the courts remains therefore, whether, having regard to these matters, housing is 'not reasonably suitable for occupation in that condition'[115] as was the case under the old section 10 LTA 1985 but now with an expanded and modernised list of factors to be considered when determining fitness.

[114] H(FHH)A 2018, s1(4) inserts a new LTA 1985 s10(2) which reads as follows: 'In subsection (1) "prescribed hazard" means any matter or circumstance amounting to a hazard for the time being prescribed in regulations made by the Secretary of State under section 2 of the Housing Act 2004.'

[115] Under newly-named LTA 1985, s10(1).

To which tenancies does the new implied covenant of fitness for human habitation apply? The 2018 Act applies widely to all new tenancies of dwellings let wholly or mainly for human habitation of less than 7 years duration including new periodic tenancies granted on or after the commencement date (20th March 2019).[116] It also applies to tenancies that began as fixed term tenancies before the 20th March 2019 but become periodic tenancies after that date.[117] Moreover, it applies to a periodic or secure tenancy existing on 20th March 2019 but only 12 months after the commencement date (i.e. from 20th March 2020).[118]

How far, then, does the 2018 Act meet and address the 5 key deficiencies in the current legal framework identified in the previous section? In short, the new law does nothing to redress the limitations of the landlord's implied repairing obligation under section 11 of the LTA 1985, nor does it have anything to say to the problem of retaliatory or revenge evictions. What's more, the issues caused by the unavailability of legal aid, as will be explored in the next section, will equally continue to persist for tenants wishing to enforce the 2018 Act's new implied covenant of fitness for habitation. That said, the principal deficiency of the law prior to the 2018 Act was what has been called here the ossification of section 8 LTA 1985. In effect, by introducing a new implied covenant of fitness for habitation into tenancy agreements, the 2018 Act revives the spirit of section 8 of the 1985 legislation. Finally, whilst the new Act does not reform the HHSRS and, in fact, codifies the list of 29 hazards from the current HHSRS, the

[116] LTA 1985, s9B(1) as inserted by H(FHH)A 2018, s1(3): this includes 'replacement' tenancies: LTA 1985, new s9B(6).

[117] LTA 1985 , s9B(5) inserted by H(FHH)A 2018, s1(3).

[118] LTA 1985, s9B(4) inserted by H(FHH)A 2018, s1(3).

statute is drafted so as to automatically take account of any subsequent changes to the system which may flow from Government reviews such as that planned for 2019. This will ensure the law remains in-step with improvements and developments in this area. The new law does not, therefore, and, in truth, was never intended to respond to the weaknesses of the current legal regime around housing conditions. However, this alone is not reason enough to condemn the legislation for it sets out to address a more targeted issue of unfit housing rather than broader, structural deficiencies in the law. In so far as this was its objective, it achieves it and, thus, the 2018 Act must be seen as offering a new, supplementary layer of protection to tenants in poor housing rather than seeking to resolve the identified flaws in the current regime.

THE H(FHH)A 2018: UNANSWERED QUESTIONS

The 2018 Act poses and leaves unresolved a number of important questions which the provisions of the statute do not address. Five such questions are identified here and an answer is posited for each. First, whether an inspection and report by a local authority under the HHSRS is a pre-requisite of a finding of 'unfitness' under the new implied covenant? The answer is a clear no. The 2018 Act amends the law such that, on assessment by a court, unfitness for human habitation does not require an HHSRS Category 1 or 2 assessment. The court's task is to determine if the condition of the property in question is fit or unfit having regard to the section 10 LTA 1985 list of relevant matters which will include but are not limited to whether there has been a finding of a Category 1 or 2 hazards under a HHSRS assessment. While expert evidence from a surveyor could be required to inform the court's exercise,

equally, the court may feel able to make a finding of unfitness on very little and non-expert evidence such as the absence of an effective heating system.

A second outstanding issue concerns notice of the unfitness and access by the landlord to the premises for the purposes of assessing its condition and state of dis(repair). The 2018 Act inserts into the LTA 1985 new sections 9A(7), (8) which imply into the tenancy a further covenant that the landlord or person authorised in writing by the landlord, be permitted to enter the dwelling for the purposes of viewing its condition and state of repair but only at reasonable times of the day and on 24 hours' written notice given to the occupier. Notably, there are no provisions in the 2018 Act which require a tenant faced with an unfit dwelling, to serve notice on the landlord as to the unfitness of the premises. In this apparent lacuna, we can perhaps expect the courts to follow the same approach as taken under section 11 LTA 1985 which, as discussed in some detail earlier, also makes no mention of notice requirements and which has left the issue to the courts to resolve. How might this work? Drawing on the example of section 11 LTA 1985 and the notice requirement developed by the common law as to that provision, we can perhaps assume that, as regards property in the possession of the tenant, a landlord's liability as to unfitness of the rental property will not be activated unless and until the tenant has served notice on the landlord of the property's poor condition and the landlord has had a reasonable time to remedy the position. This would mirror the approach adopted by the courts as to section 11. As with section 11, a difficulty may arise, however, regarding defective common parts and indeed we must wait to see precisely how this complexity will be approached and resolved by the courts. How will, for example, a long leaseholder of a flat which is sub-let to a tenant but who does not own the freehold of the building be held to account for works necessary as to ensure fitness of the

common parts? Evidently, this is a complex and increasingly-frequent concern as the buy-to-let market expands. The suggestion from the Supreme Court in *Edwards*,[119] was that where neither the tenant nor the leaseholder landlord was is in possession of such common parts, the leaseholder landlord would only be liable for repairs upon the tenant giving notice. By extension, it is argued that the same approach might be adopted as to the implied term of fitness for habitation under the 2018 Act. Thus, where there is a serious hazard or defect in common parts, a tenant should be advised to serve notice of this on its leaseholder landlord. The leaseholder landlord would then be required to visit and inspect the land, confirm the remedial work to be done and complete the necessary works within a reasonable time. The leaseholder landlord ought then, however, enjoy the right to take action against the freehold owner to recover the costs of the work undertaken. This approach leads to the just result that a tenant finding itself in unfit premises faced with defects as to the common parts (which neither itself nor its leaseholder landlord possess) is not left without a remedy but has a clear course of action to pursue to resolve those unfit housing conditions.

A third unresolved question concerns what we can term the 'remedial routes' that might flow from the new 2018 Act. There appears to be two central avenues for remedy open to tenants who, facing unfit conditions, seek to rely on the new implied covenant as to fitness for habitation: (1) the possibility of a tenant seeking specific performance of the landlord's implied covenant as to fitness and securing an injunction requiring the landlord to carry out the necessary repair works; and (2) a claim in damages against a landlord for loss suffered as a result of the unfitness of the accommodation. As regards damages, the measure of damages

[119] *Edwards* at [49] per Lord Neuberger.

in the event of a finding of 'unfitness' against a landlord remains somewhat unclear. Again, the statute is silent here. It seems most likely, however, that where a court is satisfied that a breach of the implied covenant as to fitness has been established, that a tenant may be entitled to both special as well as general damages. There is no reason to think the court would do other than follow the same approach adopted in disrepair claims under section 11 LTA 1985[120] thus a tenant could for the value of any possessions damaged, the costs of any work carried out by the tenant or the cost of alternative accommodation if the tenant was forced to move due to unfit conditions. Damages may also be available for loss of amenity, harm, discomfort, pain and suffering, shock, physical injury or inconvenience suffered. The court may choose to adopt a similar approach taken in repair cases as seen in *Wallace v Manchester City*[121] where the court noted a number of ways in which the sum for general damages might be calculated including a global award for loss of amenity; a notional reduction in rent or a mixture of the two. The amount of rent payable by the tenant and the landlord's conduct will be key considerations.[122]

Two final and related issues to be addressed are the question of the venue in which claims of 'unfitness' will be heard and the availability of legal aid for such actions. Given that a claim of unfitness for human habitation is likely to result in an injunction or a maintenance or works

[120] On which see *Calabar Properties Ltd* v *Stitcher* [1984] 1 WLR 287.

[121] *Wallace* v *Manchester City Council* (1998) 30 HLR 1111.

[122] In the context of LTA 1985, s11, see discussion in *English Churches Housing Group* v *Shine* [2004] EWCA Civ 434 such that if the award of special damages is in excess of the rent payable by the tenant during the relevant period, clear reasons must be given.

order being made, this limits the venue for such actions to a court. Fitness for human habitation proceedings will therefore most routinely be heard in the county courts and, in rare cases, in the High Court. As to the availability of legal aid, it will be limited to cases where there is a serious risk of harm to health and safety in the same way as claims concerning disrepair as so constrained. No legal aid will be available for claims for damages. Having set out the changes wrought by the 2018 Act, the final section reflects further on the effectiveness of the new legislation to meet the challenges and deficiencies identified in the current legal framework by asking if the 2018 is fit for purpose.

THE H(FHH)A 2018 ACT: FIT FOR HABITATION BUT FIT FOR PURPOSE?

There is much to herald and to welcome in the H(FHH)A 2018. The 2018 Act introduces a new implied covenant on landlords to guarantee that rental premises in the private and social sectors are fit for human habitation both at the moment of grant but also throughout the lifetime of the tenancy. In this way, the 2018 Act effectively re-activates the defunct and antiquated section 8 LTA 1985 which had become ossified as a result of the statutorily-imposed rent limits. The standard of 'fitness for human habitation' has also been expanded and modernised from the old section 10 LTA 1985 by codifying in statute the hazards enshrined in the HHSRS as an addition to rather than substitute for the already-existing 9 fitness categories in section 10 LTA 1985. This refreshed and fitness standard, at last, brings the 1985 legislation firmly into the 21st century to better reflect the housing challenges facing the country and, simultaneously, offers a framework that is complementary to and aligns with the HHSRS thereby avoiding parallel and competing enforcement standards and regulation in the rental sector. This new 'fitness standard' now extends to cover matters not previously

provided for in the old law such as dampness caused by design defects as opposed to dampness stemming from disrepairs.

The 2018 Act is, however, at its most potent in that it endows tenants with a new legal 'voice' via what is, in practice, a new civil remedy against their landlord when rental housing is unfit. The provisions of the 2018 Act give tenants, for the first time in decades, an effective tool to bring legal action against landlords who, faced with complaints of poor housing by their tenants, fail to take the necessary corrective, maintenance work. Tenants will be able to initiate legal proceedings against landlords where their property is not fit; seeking an injunction or damages for a landlord's failings. Tenants may not even need to instruct expensive surveyors to assess defects and may be able to make use of their own proof of poor conditions such photographic evidence of mould or other hazards thereby reducing costs and improving access to justice for tenants. Crucially, this marks an improvement from the current position in 3 key respects. First, tenants in unfit housing now have a means of enforcing property standards directly ***themselves*** rather than having to rely on their local authority taking action under the HHSRS which, as this article has demonstrated, has long been interpreted and enforced inconsistently. Secondly, tenants are no longer required to 'shoe horn' poor housing conditions within the section 11 LTA 1985 implied covenant as to repairs and, instead, can make use of the new, extended implied covenant as to fitness. Thirdly, the changes introduced by the 2018 Act apply to both the private and socially-rented sectors. For social tenants, this means closing a lacuna that previously existed and addressing the anomaly of the old system whereby tenants in private rents could call upon their local authority Environmental Health Officer to investigate poor housing but social tenants could not (as authorities are barred from taking enforcement action against themselves). As explored

earlier in this article, the pre-2018 legal framework provided tenants with symbolic, what have here been termed 'emblematic' or 'notional' rights rather than practical and realisable means of redress when faced with unfit, non-decent housing. These emblematic rights are given concrete form under the new implied covenant of fitness.

We know that it is the poorest and vulnerable in society who are most likely to find themselves in sub-optimal housing. The 2018 Act goes some way to rectify this position through empowerment of tenants by placing new rights to seek remedy directly into tenants' hands whether their landlord be private or local authority. Under the 2018 Act, tenants' rights are no longer merely emblematic or notional but rather tenants enjoy real, tangible and enforceable legal rights against a malfeasant landlord and are offered a path to ensuring that maintenance and repair of sub-standard housing is delivered. A case can even be made that the provisions of the 2018 Act might empower victims of domestic abuse who, finding themselves in a violent or controlling relationship have previously been forced to elect between remaining in that abusive circumstance or leaving and moving into unfit, hazardous and potentially harmful housing.[123] The new implied covenant will strengthen tenants' rights, improve the standard of housing stock and, it is hoped, mean those suffering abuse can flee harmful relationships with greater confidence that they can find housing that is suitable and of a decent standard.

[123] N. Akthar-Sheikh, 'Fitness for Habitation Bill will empower victims of abuse' *The Guardian* (6th February 2018).

Only time will tell of the true impact that the changes will have on the wider housing stock and property landscape in England. There must be, at least, the very real prospect that the changes under the 2018 Act can transform the lives of tenants currently living in squalid and health-harming accommodation. The new rights should see more tenants taking landlords to court and thereby slowly but surely lead to improvement in the general state and condition of the rental sector across the country.

As landlords, with the help of the Residential Association of Landlords (RLA) and National Association of Landlords (NAL), scramble to make sense of the new legislation and to appreciate the parameters of their obligations, the 2018 Act should, in addition, have a positive impact on the quality of landlordism and landlord education in England more widely. All landlords whether rogue or model will be required to take heed of the new legal panorama and take action to mitigate the risk of their being pursued in legal proceedings. Precisely what form this will take will vary from landlord to landlord but the new Act may lead to new auditing regimes by residential landlords of properties, inspection and increased awareness of and concern for the state of their housing portfolios. In so far as this will re-balance the market in favour of tenants, it is to be hailed.[124] There may also be unintended but nevertheless advantageous consequences of the new provisions for local authorities. A Freedom of Information Request by Shelter in 2015 found that formal enforcement action taken by local authorities in England had fallen by 40 per cent in the previous Parliament. Under the 2018 Act, with tenants themselves given the right to pursue a remedy against a

[124] This complements the wider debates around and stated focus of the Government as to improving consumer rights and intervening in failing markets.

landlord directly, this will give room to cash-strapped local authorities to focus their efforts and husband their scare resources more efficaciously on tackling the most unscrupulous, rogue landlords in their areas, in turn, leading to improved rental conditions for all.[125] For the majority of landlords who are well-meaning, honourable and with existing practices in place to ensure good quality housing, the 2018 Act poses no threat, and satisfaction of the new fitness obligation should, for these landlords, be near-automatic and involve little or no additional cost. The 2018 Act, therefore, deftly delivers empowerment to tenants without imposing unduly onerous or new burdens on landlords as those landlords who already comply with their obligations will not fall foul of the new framework which introduces no new housing standards or regulations. This perhaps explains the public endorsement the Bill received from landlord-leaning bodies, the RLA and the NLA.

Given a major motivation for the 2018 Act was the Grenfell Tower disaster, it is not insignificant to note that, had the 2018 Act been in force prior to the tragedy, it could potentially have made a genuine difference. Grenfell demonstrated the effects of not hearing and actioning tenants' concerns. Grenfell tenants had repeatedly raised serious concerns as to the poor conditions and safety failings in their tower block. These concerns were ignored and tenants were left with no further avenue for redress. This is an experience shared by renters across the whole country. In so far as the implied covenant of fitness under the 2018 Act extends to all common parts and structures of a building over which the landlord has an interest (including stairwells, fire doors, emergency lights and sprinkler systems), post-

[125] Including exploiting the new powers enjoyed by local authorities under the Housing & Planning Act 2016 as to rogue landlords.

Grenfell, it is hoped that this will give tenants grounds to force their landlords to guarantee that these common areas are in a safe condition.

Despite this and whilst there is much to laud in the 2018 Act, it does not, however, meet in any greater sense the key deficiencies of the current legal framework as identified earlier in this article. In this way, the 2018 Act, whilst welcome, falls short of the radical change needed to tackle the causes and effects of the housing crisis gripping the country. By way of example, although the 2018 Act places greater power in the hands of tenants to take landlords to task, this is dependent on the stamina, willingness and fortitude of tenants (and financial circumstances in view of the unavailability of legal aid in most cases) actually bring and see through legal action. As has been noted:

'Many tenants are vulnerable, or have too many other things going on in their lives to prioritise legal action. Moreover, legal action is particularly problematic when we suffer from an acute shortage of affordable housing.'[126]

Equally, giving tenants greater power to complain does nothing to prevent the very real problem of retaliatory or revenge eviction by landlords who, faced with complaints, calculate they can evict a tenant and avoid the consequences and cost of providing a decent standard of housing. In addition, nor does the 2018 Act make any change to the HHSRS nor the HHSRS Guidance which is now severely outdated and in need of reform. Indeed, rather than amend or update the HHSRS, the 2018 Act actively adopts it; enshrining the 29 HHSRS hazards in

[126] Universities of Kent and Bristol, Joint Report, n 101 above, 14.

statute. Despite a commitment by the Government to review the operation of the HHSRS in 2019, this is in a sense a missed opportunity to grasp more robustly the problems of the wider regulatory framework around housing standards. While political expediency and Parliamentary tactics would likely have scuppered a more wholesale attempt to reform the law in this area, the legal and regulatory framework around the state of housing in England remains flawed despite the 2018 statute's enactment. We wait to see the proposals for reform that follow consultation around the HHSRS which remains a vital mechanism for improving housing standards in England.

More broadly, enormous problems in the housing market remain unresolved; problems which a single piece of legislation could never hope to eliminate. Chief among them is the problem of soaring rents and an under-supply of genuinely affordable homes in England. Shelter, in its January 2019 Report, pulls no punches in insisting that what is needed is 'a decisive and generational shift in housing policy . . . [a] move towards a programme of investment and reform, based on a new vision … at the heart of a working housing system.'[127] In addition to calling for 3.1 million new social homes to be built by 2040, Shelter recommend wide-ranging changes to both the private and social sectors including: the creation of a new consumer regulator (in the vein of the Financial Conduct Authority) to inspect housing and protect renters and ensure tenants' voices are heard; increased support to tenants to complain about the state of housing; the creation of a tenants' unions to represent tenants' views at a national and local level; increased funding for local enforcement to tackle rogue landlords and poor

[127] Shelter, *Building for our future: A vision for social housing* (January 2019), 17; available at: https://england.shelter.org.uk/support_us/campaigns/a_vision_for_social_housing.

housing and, finally, ending section 21 eviction notices by changing the law so that permanent tenancies are the legal minimum for all private renters.[128]

CONCLUSION

Given the youth and greenness of the 2018 legislation, there is much to ponder, digest, and for landlords and tenants to fight over in litigation before the courts. In short, however, whilst the 2018 Act does not address the deep and long-standing deficiencies inherent in the wider legal framework around housing standards, it is a highly-significant intervention in the housing market with wide-ranging implications for both private and social rental sectors. The legislation empowers and endows tenants faced with dangerous, unfit housing conditions with new civil rights to seek a remedy against unscrupulous and failing landlords. In this way, the H(FHH)A 2018 offers the very real potential to transform tenants' lives and to reset the power imbalance between landlords and tenants in a housing market stacked heavily against tenants and overwhelmingly in favour of landlords. This should, if nothing else, offer the prospect of an improvement to the state of housing stock for all across England.

[128] *ibid*, 212-217.